Filed 5/30/07 L.L. v. Sup. Ct. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

L.L., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D050372 (San Diego County Super. Ct. No. NJ13219)
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Real Party in Interest.	

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing, Joe O. Littlejohn, Judge. Petition granted.

L.L. seeks review of juvenile court orders terminating family reunification services and setting a hearing under Welfare and Institutions Code section 366.26.[1] L. contends the evidence is insufficient to support the court's finding the Agency provided reasonable services. She also asserts the court erred when it did not make findings required by section 361.5, subdivision (e)(3). We conclude the court's finding of reasonable services is not supported by substantial evidence, and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2005, the North County Regional Gang Task Force conducted a search of L.'s residence. Detectives found heroin, methamphetamine, methadone and drug paraphernalia in the home. Officers arrested L. and charged her with child endangerment and possession of heroin. L.'s son, Robert L., then age three, was detained by San Diego County Health and Human Services Agency (Agency).

L., then 26 years old, told the social worker that she began using heroin at age 18 and used it until she was arrested and incarcerated at age 22. L. had been on methadone for three years. She denied the drugs in the home were hers, but admitted she had a "one-time" relapse two months earlier. L.'s criminal history included convictions for second degree burglary and petty theft in 1999, 2001 and 2004, felony possession of a controlled substance and drug paraphernalia in 1999, and possession of drug paraphernalia in 2001.

On November 29, 2005, the court found that Robert required the protection of the juvenile court. (§ 300, subd. (b).) On January 26, 2006, the court removed Robert from

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1 All statutory references are to the Welfare and Institutions Code unless otherwise

parental custody and ordered a plan of family reunification. Later, the Agency placed Robert with a maternal cousin. During visits, L. was "very involved" with Robert and their interactions were appropriate.

L. did not participate in court-ordered reunification services, missed visits with Robert, and appeared to be avoiding criminal proceedings. In March 2005, L. was arrested after she did not appear for a sentencing hearing. In April, she received a four-year sentence and was incarcerated at the state prison in Chowchilla.

The six-month review hearing, originally scheduled for May 30, 2006, was heard on January 9, 2007.[2] While incarcerated, L. completed a parenting class, began an adult education program, and enrolled in a substance abuse program consisting of 12-step meetings, group therapy and classes. She maintained regular telephone contact with Robert, and sent him cards and letters. In October 2006, L. was moved to local custody at Las Colinas to participate in juvenile court proceedings, and had supervised visits with Robert twice a month. At every visit, Robert asked to come home with her.

L.'s release date was April 9, 2008. She testified she had been clean and sober for 10 months, and had not been on methadone since late March 2006. L. was applying to the Community Prisoner Mother/Infant Program (CPMP), a Department of Corrections program that allowed young children to live with their incarcerated mothers outside of a

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specified.

[2] The review hearing was often delayed by paternity issues not relevant to this proceeding.

prison setting. (See Pen. Code, § 3410 et seq.) She needed a copy of Robert's birth certificate to complete her application to CPMP.

The hearing judge, the Honorable Michael Imhoff, stated the court did not oppose L.'s application to CPMP. The court informed the parties it would wait until after the prescreening process for a formal request to make findings required under section 361.5, subdivision (e)(3).) L. asked for a 30-day continuance of the 12-month review hearing to complete her application.[3]

The contested 12-month review hearing was heard by the Honorable Joe O. Littlejohn on February 23, 2007. Agency recommended the court terminate reunification services and set a section 366.26 hearing. The social worker testified she was in court on several occasions when L.'s participation in CPMP was discussed. She did not provide any assistance to L. because she believed Robert's placement in the program would be unsupervised. The social worker did not contact CPMP personnel for information about the program, and did not know whether the placement would be unsupervised.

L. testified she could not submit her application to CPMP until she received Robert's birth certificate. She had asked her criminal defense attorney, social worker, and a second social worker for assistance. She was informed she had to go through her social worker. Except for Robert's birth certificate, her application was complete.

The court found there was no substantial probability Robert would be returned to L.'s custody by the 18-month review date in April 2007, terminated reunification

services, and set a section 366.26 hearing. The court directed Agency to provide L. a copy of Robert's birth certificate. L. petitions for review of the court's orders. (§ 366.26, subd. (*l*); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause and the Agency responded.

DISCUSSION

L. contends the court erred when it found Agency provided reasonable reunification services. She argues Agency unreasonably refused to complete the simple task of giving her a copy of Robert's birth certificate to facilitate her application to CPMP. She asserts the court erred when it did not make findings required by section 361.5, subdivision (e)(3).

Agency responds that substantial evidence supports the court's finding reasonable services were offered or provided. It asserts it was premature for the court to make findings under section 361.5, subdivision (e)(3) until L. was accepted into CPMP.

A

When a party challenges the finding that reasonable services were offered or provided, we determine whether there is substantial evidence to support the court's finding by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) In applying the substantial evidence test to a finding of reasonable efforts, we keep in mind that clear and convincing evidence must support the

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3 The court had scheduled the 12-month review hearing to trail the delayed six-

finding. (§ 366.21, subd. (g)(2); *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326.) The party challenging the finding bears the burden of showing there is insufficient evidence to support the ruling. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Family reunification services play a "crucial role" in dependency proceedings. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 467; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 545.) The child's case plan is the "guiding principle in the provision of these services." (§ 16501, subd. (a).) "At the disposition hearing, unless the state proves by clear and convincing evidence that one of the exceptions to reunification under section 361.5, subdivision (b) applies, . . . the juvenile court must provide services designed to reunify the family within a statutory time period. (§ 361.5; see 42 U.S.C. § 629a (a)(7).)" (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563-564.)

"The effort must be made to provide suitable services, in spite of the difficulties of doing so or the prospects of success." (*In re Dino E.* (1992) 6 Cal.App.4th 1768.) If a parent is incarcerated, reunification services must be provided to that parent unless the court determines that those services would be detrimental to the child. (§ 361.5, subd. (e)(1).) The supervising agency must preliminarily identify the services available to an incarcerated parent. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1012 (*Mark N.*).) Although a social services agency has no control over the services offered at a penal facility, the agency can "notify the prison an incarcerated parent is in need of reunification services; determine whether any appropriate services are available at the . . .

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month review hearing.

institution in question; and explore whether changes in the housing of the parent prisoner can be made to facilitate the provision of such services consistent with legitimate prison and public safety concerns." (*Id.* at p. 1013.)

In 1978, the Legislature established the community treatment program for incarcerated mothers and their children under the age of six years. This program provides for the release of the mother and child to a community facility suitable to their needs that will provide the best possible care for the mother and child, and a safe and wholesome environment for the participating children. (Pen. Code, §§ 3411, 3416, subd. (a); see Stats. 1978, ch. 1054, p. 3255, § 4.)

The probation department is required to notify any woman sentenced to state prison for six years or less of the provisions of the community treatment program. (Pen. Code, § 3415, subd. (a).) If the woman wants to be admitted to a program, she is required to give notice and submit an application. (Pen. Code, §§ 3414, subd. (b); 3420.) Subject to reasonable rules and regulations, the California Department of Corrections and Rehabilitation (the Department) is required to admit any applicant who meets all statutory requirements under Penal Code section 3417. (Pen. Code, § 3417, subd. (a).) The Director of Corrections must deny placement if an inmate would pose an unreasonable risk to the public. In other cases, the Director has discretion to deny or approve placement if the applicant does not meet all the statutory requirements for participation. (Pen. Code, § 3417, subds. (b), (c).)

The fact that an applicant's child is a dependent of the juvenile court under section 300 is not, by itself, grounds for denying the applicant the opportunity to participate in

the program. (Pen. Code, § 3417, subd. (b)(3).) If the child is a dependent of the juvenile court, the applicant "shall be admitted to the program only after the [juvenile] court has found that participation in the program is in the child's best interest and that it meets the needs of the parent and child" under section 361.5, subdivision (e)(3). (*Ibid*.; see also Pen. Code, § 3420, subd. (d).) The Department shall determine if the applicant meets the requirements of Penal Code section 3417 within 30 days of the parent's application to the program. (Pen. Code, § 3417, subd. (d).)

The goal of the case plan was Robert's "Return Home." "The adequacy of reunification plans and the reasonableness of [the agency's] efforts are judged according to the circumstances of each case." (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164.) Considering L.'s four-year prison sentence, returning Robert to parental custody within statutory time limits was not feasible without the prospect of participation in a community treatment program such as CPMP. When L. was incarcerated, Agency did not ask the court to consider denying reunification services under section 361.5, subdivision (e)(1),[4] and family reunification remained a goal of the dependency proceedings.

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4 Section 361.5, subdivision (e)(1) states, in part: "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, and any other appropriate factors."

L. needed a copy of Robert's birth certificate to complete the application to CPMP. Agency acknowledges the social worker had a duty to obtain a copy of the birth certificate but argues she did not have time between the six-month and the 12-month review hearings to obtain it. This argument is not supported by the record. The social worker conceded she did not "do anything" to assist L. in applying for the program, and testified she did not respond to L.'s request because she believed Robert's placement in the program would be unsupervised. At the 12-month review hearing, the trial court found it necessary to issue a specific order directing Agency to provide L. with a copy of the birth certificate.

We are not persuaded by the argument that the social worker's response was reasonable because L. did not have Agency approval to participate in CPMP. L. does not need Agency approval *to apply* to a community treatment program. (See Pen. Code, §§ 3411, 3415, 3416, 3420.) Agency may or may not recommend a child's placement in a community treatment program. We expect Agency to be well-informed and consider the child's needs and wishes, the services offered by the specific program, and the mother's ability to succeed in the program and provide a safe home for her child. Here, the record shows Agency did not make reasonable efforts to inquire into the services and program structure offered by CPMP.[5] More importantly, regardless of its position on the

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[5] The Legislature declared the prime concern in operating a community treatment program is "the establishment of a safe and wholesome environment for the participating children." (Pen. Code, § 3416, subd. (a).) The Legislature has mandated standards and guidelines for community treatment programs, with particular emphasis on pediatric care, professional guidance in child development, programs geared to assure the stability of the

merits of such a placement, Agency may not conduct itself in a manner that would hinder, delay or prevent an incarcerated mother from applying to a community treatment program. (See *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1402 ["Go to prison, lose your child" is not an appropriate legal maxim.].)

Agency argues the court's finding of reasonable services is supported by the other services it offered or provided L. throughout the dependency proceeding.[6] Although necessary to reunification, none of the other services, either singly or collectively, provide L. the opportunity to physically reunify with Robert within the statutory time period. Although providing a copy of Robert's birth certificate may appear to be a trivial detail, without it, L. cannot apply to CPMP, the juvenile court cannot determine whether participation in CPMP is in Robert's best interests, and the parties are left on "a conveyor belt leading to termination of parental rights." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 667-676.)

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parent-child relationship during and after participation in the program, to be developed and supervised by appropriate professional guidance, and access to available local Head Start, Healthy Start, and programs for early childhood development, including transportation. (See Pen. Code, § 3412.)

6 The record does not show whether individual counseling and a psychological evaluation were available to L. while incarcerated or that Agency contacted prison officials to provide these or alternative services. (*Mark N., supra,* 60 Cal.App.4th at p. 1013.) A case plan must be specifically tailored to fit the circumstances of each family. (*Id.* at p. 1010, *In re Dino E., supra,* 6 Cal.App.4th at p. 1777.)

Under these circumstances, we conclude the evidence is insufficient to support the finding Agency provided reasonable services designed to reunify the family within the statutory time period. (*In re Alanna A.*, *supra*, 135 Cal.App.4th at pp. 563-564.)

B

The juvenile court is not required to make findings under section 361.5, subdivision (e)(3) until an application for a community treatment program has been submitted to the Department. (Pen. Code, §§ 3417, subd. (b)(3); 3420.) The court properly deferred consideration of the findings required by section 361.5, subdivision (e)(3).

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its finding of reasonable services and order setting a hearing under section 366.26, and enter a new order providing L. with a reasonable period of reunification services. (§§ 361.5, subd.

(a); 16501; 16501.1; see *In re Dino E., supra*, 6 Cal.App.4th at pp. 1776-1779.) This decision is final immediately as to this court. (Cal. Rules of Court, rule 8.264(b)(3).)

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.